

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 24, 2003

STATE OF TENNESSEE v. JAMES L. JORDAN

Direct Appeal from the Criminal Court for Hamilton County
No. 235458 Stephen M. Bevil, Judge

No. E2002-01586-CCA-R3-CD
September 22, 2003

The Defendant, James L. Jordan, was convicted by a jury of three counts of aggravated assault, a Class C felony. See Tenn. Code Ann. § 39-13-102(d)(1). At the sentencing hearing, the trial court, acting as thirteenth juror, dismissed one of the convictions. For each of the other two convictions, the court sentenced the Defendant as a Range I offender to concurrent terms of six years. The Defendant failed to execute an appeal of his convictions. He subsequently filed a petition for post-conviction relief. After a hearing, the trial court dismissed the Defendant's petition but granted the Defendant a delayed appeal. In this delayed appeal, the Defendant raises four issues: (1) whether the evidence was legally sufficient to support his two convictions for aggravated assault; (2) whether the Defendant was adequately advised of his right to counsel before waiving his right to a preliminary hearing; (3) whether the trial court erred by admitting into evidence a handgun found at the Defendant's residence; and (4) whether the trial court properly sentenced the Defendant. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Melanie R. Snipes, Chattanooga, Tennessee, for the appellant, James L. Jordan.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Bill Cox, District Attorney General; and Christopher D. Poole, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 30, 1999, Penny Collier was at her mother's house in Chattanooga. She and a few friends and relatives were standing in front of the house talking when the Defendant, who lived across the street, approached them. Ms. Collier testified that the Defendant had been drinking and

was using foul language and making sexual comments. Ms. Collier told the Defendant to go home, and he pulled out a knife. He again began to curse Ms. Collier, but he eventually went back to his house. When he returned, he told Ms. Collier that he had something to show her. He then reached behind his back and produced a gun. He removed the bullets and then replaced them to demonstrate that the gun was loaded. When the Defendant left a second time, Ms. Collier called 911. However, no one answered the phone. Ten or fifteen minutes later, a dispatcher called Ms. Collier back, and Ms. Collier told her that a man had been there with a gun. The Defendant returned from his house, still brandishing the gun. Ms. Collier testified that the Defendant “said that he had did fifteen fucking years for killing somebody else and he didn’t mind going to jail for fifteen more for killing somebody else.” She also testified that she believed the Defendant and was afraid of him.

Sara Steigal’s testimony was similar to that of Ms. Collier. She stated that the Defendant was drunk and making sexual remarks to Ms. Collier. When Ms. Collier told the Defendant to leave her alone, he pulled a knife on her and told her how he had killed a person. The Defendant went back to his house, and when he returned, he again used foul language. At that point, Ms. Steigal asked him to leave, and the Defendant began cursing at her. He threatened to go to his house and retrieve his gun, which he did. The Defendant showed them his gun, “demonstrating how he killed a person, [and he] said that he didn’t mind killing us.” The Defendant then pointed the gun at Ms. Steigal and her nine-month-old daughter, Nakia Robinson, who was in Ms. Steigal’s arms. Ms. Steigal testified that she believed the Defendant when he said he had killed another person and did not mind killing others.

Eventually the police responded to the 911 call. The police initially surrounded the Defendant’s house, to which he had fled, and attempted to communicate with him. After several hours of attempting to convince the Defendant to come out of his house, the police finally injected tear gas into the residence. After the Defendant was apprehended, the police searched the Defendant’s house. Sergeant John Spain located the Defendant’s gun inside the bag of a vacuum cleaner.

Based on this evidence, the Defendant was convicted of aggravated assault with respect to Penny Collier, Sara Steigal, and Ms. Steigal’s nine-month-old daughter Nakia Robinson. After the sentencing hearing, the trial judge dismissed the Defendant’s conviction for the aggravated assault of Nakia Robinson because there was no evidence that the child had been put in reasonable fear of imminent bodily injury. See Tenn. Code Ann. § 39-13-102(a)(1), -101(a)(2).

The first issue raised by the Defendant is whether there was sufficient evidence presented at trial to support his two remaining convictions for aggravated assault. Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the

presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs, 995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not “re-weigh or re-evaluate the evidence” in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. See Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

Aggravated assault is assault with a deadly weapon being used or displayed. See Tenn. Code Ann. § 39-13-102(a)(1)(B). A person commits assault when he or she “[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury . . .” Tenn. Code Ann. § 39-13-101(a)(2).

In this case, Penny Collier and Sara Steigal testified that they were talking in front of Ms. Collier’s mother’s house when the Defendant approached them.¹ He had been drinking, and he began to make comments that were sexually suggestive and crude. When the women asked him to leave them alone, he produced a knife and began to threaten them. Eventually he went to his house, where he got a gun. When he returned, he showed the gun to the women, removed the bullets to show them it was loaded, and told them that he had killed someone before and did not mind doing it again. The women testified that they believed the Defendant would carry out his threat. The police located the gun in a vacuum cleaner in the Defendant’s house. This evidence is sufficient to support the Defendant’s convictions for the aggravated assaults of Penny Collier and Sara Steigal.

The second issue raised by the Defendant is whether he was adequately advised of his right to counsel before he waived his right to a preliminary hearing. In his brief, the Defendant states, “The record simply shows where the Defendant signed his name under the waiver of counsel provision on the form used in General Sessions Court.” He then references a document which he describes as “Exhibit A.” The document to which the Defendant refers is an affidavit of complaint that he attached to his brief. The Defendant’s signature appears twice on the back of the complaint, first under the paragraph indicating that he wished to waive the preliminary hearing and also under the paragraph indicating that he waived his right to counsel. This document may not be considered because it is not properly in the record on appeal. See Tenn. R. App. P. 28(a); State v. Matthews,

¹We note that two other witnesses, Kimberly Robinson and Kashondra Robinson, put forth essentially the same testimony as Ms. Collier and Ms. Steigal.

805 S.W.2d 776, 783 (Tenn. Crim. App. 1990). The Defendant states in his brief, “The record does not indicate whether an inquiry of this waiver was conducted.”

The Defendant is correct in saying that the record does not reflect whether or to what extent he was advised of his right to counsel before he waived his right to a preliminary hearing. However, “[i]t is the duty of the party seeking appellate review to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues raised by the party.” State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. 2002); see also State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). “When the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, this Court is precluded from considering the issue.” Dellinger, 79 S.W.3d at 484; see also State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). Because the record is incomplete with respect to this issue, the issue is waived.

Next the Defendant contends that the trial court erred by admitting into evidence a handgun found at the Defendant’s residence. Specifically, the Defendant argues that it was error to admit the weapon because no chain of custody was established. It is a fundamental rule of law that the State must establish an unbroken chain of custody in order to present physical proof into evidence. See State v. Scott, 33 S.W.3d 746, 760 (Tenn. 2000). “The purpose of the chain of custody requirement is ‘to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.’” Id. (quoting State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)). However, every witness that handled the evidence in the chain is not required to testify in order to establish a lack of tampering with the evidence. See State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998). Likewise, the identity of tangible evidence need not be proven beyond all possibility of doubt, and the State is not required to establish facts which exclude every possibility of tampering. See Scott, 33 S.W.3d at 760. “The evidence may be admitted when the circumstances surrounding the evidence reasonably establish the identity of the evidence and its integrity.” Id. This Court reviews the trial court’s decision on whether the State has established the proper chain of custody of physical evidence under an abuse of discretion standard. See Holbrooks, 983 S.W.2d at 701.

In this case, Sergeant John Spain testified that he searched the Defendant’s house. Inside the bag of a vacuum cleaner, he located a Walther pistol. He stated that the gun that was shown to him by the prosecutor was the Walther pistol he recovered from the Defendant’s residence. After Sergeant Spain testified on direct examination, the trial court admitted the weapon into evidence. On cross-examination, Sergeant Spain testified that as soon as he found the gun, he gave it to Officer Michael Short, the officer who initially responded to the call. Officer Short, as the case officer, “logged it and recorded it.” Sergeant Spain also testified that, from the time the gun was recovered until the time of trial, the gun had been in the police property section. During cross-examination, defense counsel objected to the admissibility of the gun based on the State’s failure to properly establish a chain of custody. The trial court overruled the Defendant’s objection because Sergeant Spain identified the gun as the one he found in the vacuum cleaner in the Defendant’s house.

Later in the trial, Officer Short testified that Sergeant Spain found a weapon in a vacuum cleaner bag in the Defendant’s house. He identified the gun that was admitted into evidence as the

gun that Sergeant Spain found. He also observed that his name and the name of an Officer Burnette appeared on the tag that was attached to the gun. Officer Short testified that his name appeared on the tag because he was the arresting officer, and Officer Burnette was the officer who actually took the weapon to the police property division, where it had been since the time of the crimes.

We must conclude that the trial court prematurely admitted the gun into evidence. At the time the gun was admitted as an exhibit, Sergeant Spain had merely testified that he found the gun at the Defendant's house, and it was the same gun that the prosecutor showed him. There was no testimony at that point regarding the chain of custody of the weapon. Therefore, the trial court should have admitted the gun for identification purposes only.

However, this error is clearly harmless because, after the gun was admitted into evidence, both Sergeant Spain and Officer Short testified that Officer Short was responsible for logging the gun into police evidence, as evidenced by his name appearing on the tag attached to the weapon. Both officers testified that Sergeant Spain gave the gun to Officer Short. After the gun was examined and processed, Officer Burnette took it to the police property section. Sargent Spain and Officer Short testified that the weapon had been in the police property division from the time of the crimes until the time of the trial. This evidence sufficiently established a proper chain of custody. Although it may have been preferable for the State to call as a witness Officer Burnette, who actually took the gun to the evidence section, not every witness that handled the evidence in the chain is required to testify in order to establish a lack of tampering with the evidence. See Holbrooks, 983 S.W.2d at 701. Therefore, although we believe the trial court acted prematurely by admitting the gun into evidence following the direct examination of Sergeant Spain, the error is harmless because sufficient evidence was put forth later in the trial to properly establish the chain of custody. This issue is without merit.

Finally, the Defendant asserts that he was improperly sentenced by the trial court. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In this case, the presentence report is not included in the record on appeal. Furthermore, the transcript of the sentencing hearing reflects that a certified copy of the Defendant's prior conviction for second degree murder was also introduced as an exhibit at the hearing, but it is not included in the appellate record. No witnesses testified at the sentencing hearing.

After establishing that the Defendant possessed a prior conviction for second degree murder, the trial court properly determined that the Defendant was a Range I offender. A Range I offender convicted of aggravated assault, a Class C felony, is subject to a potential sentence of three to six years' confinement. See Tenn. Code Ann. § 40-35-112(a)(3). In determining the appropriate sentence for the Defendant, the trial court found two enhancement factors: (1) the Defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range; and (2) the felony involved the threat of bodily injury to another person and the Defendant had previously been convicted of a felony that resulted in death. See id. § 40-35-114(2), (12) (Supp. 2002). The trial court found no mitigating factors. At the conclusion of the sentencing hearing, the court imposed the maximum sentence in the Defendant's range with respect to each of the Defendant's two aggravated assault convictions, and it ordered the sentences to be served concurrently in the Department of Correction.

The Defendant's challenge to his sentences is twofold. First, he argues that the trial court erred by imposing the maximum sentence in the Defendant's range. Rather than directly challenging the application of the two enhancement factors relied upon by the trial court, the Defendant contends that, because no one was injured in this case, the maximum sentence was excessive. However, neither of the enhancement factors applied by the trial court requires that a person be injured. Tennessee Code Annotated section 40-35-114(2) requires evidence of a prior history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. Section 40-35-114(12) requires evidence that the instant offense involved at least the threat of bodily injury, and the criminal defendant had previously been convicted of a felony that resulted in death or bodily injury. Therefore, we find that the trial court did not err in its application of the two enhancement factors, which are sufficient to justify the trial court imposing the maximum sentence in the Defendant's range for each of his two convictions. This issue is without merit.

Second, the Defendant asserts that the trial court erred by denying him some form of an alternative sentence.² A defendant who “is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6); State v. Lane, 3 S.W.3d 456, 462 (Tenn. 1999). Guidance regarding what constitutes “evidence to the contrary” which would rebut the presumption of alternative sentencing can be found in Tennessee Code Annotated section 40-35-103(1), which sets forth the following considerations:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

See State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000); State v. Ashby, 823 S.W.2d 166, 170 (Tenn. 1991).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. See id. § 40-35-103(5).

A criminal defendant challenging a trial court’s sentencing decision bears the burden of establishing that his or her sentence is improper. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; see also Ashby, 823 S.W.2d at 169. The Defendant has not met his burden in this case. In commenting on the sentence he imposed against the Defendant, the trial judge referenced the seriousness of this offense. The Defendant, while intoxicated, pointed a loaded pistol at unarmed women and children. He told them that he had served fifteen years in prison for killing a person before, and he would not mind doing it again. Furthermore, it is apparently undisputed that the Defendant had been previously convicted of second degree murder. We agree with the trial court that the circumstances of this offense are sufficiently serious to warrant confinement. See Tenn. Code Ann. § 40-35-103(1)(B). The trial court did not err by ordering the Defendant to serve his sentences in confinement, and this issue is without merit.

The judgments of the trial court are affirmed.

²We note that the Defendant did not argue for the imposition of some form of an alternative sentence at the sentencing hearing.

DAVID H. WELLES, JUDGE